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Supreme Court of the United States,

OCTOBER TERM, 1927.

No. 102.

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

v.

GEORGE FLINT, SAMUEL COLLINS AND LUDWIG T. BREHM, ETC.,
Respondents.

REPLY BRIEF.

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
for the Petitioner.

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INDEX OF AUTHORITIES CITED.

	PAGE
34 American Law Reports, 63, 67	5
41 American Law Reports, 9	5
Angle *v.* Chicago Ry. Co., 151 U. S. 1, 15	4
Aquitania, 270 Fed. 239	5
Baltimore S. S. Co. *v.* Phillips, 274 U. S. 316	3
Bitterman *v.* Louisville R. R. Co., 207 U. S. 205	4
Claveresk, 264 Fed 276	3
Conqueror, 166 U. S. 110	1, 2
Dominion Coal Co. *v.* Maskinonge S. S. Co. [1922] 2 K. B. 132	3
Duckett *v.* United States, 266 U. S. 149	2
Elliott Steam Tug Co. *v.* Shipping Controller [1922] 1 K. B. 127, 139	3
Grand Republic, 10 Fed. 398	4
Hines *v.* Sangstad S. S. Co., 266 Fed. 502	3
Johnson *v.* Cadillac M. C. Co., 261 Fed. 878	5
Lawrence *v.* Fox, 20 N. Y. 268	5
North Star, 151 Fed. 168	1
Omnia Com. Co. *v.* U. S., 261 U. S. 502	2
Osaka *v.* Lumber Co., 260 U. S. 490	4
Panama R. R. Co. *v.* Rock, 266 U. S. 209	3
Potomac, 105 U. S. 630	1, 2
Seaver *v.* Ransom, 224 N. Y. 233	5, 6
Strong *v.* American Fence Co., 245 N. Y. 18	6
Susquehanna, 17 Asp. M. C. 81	2
U. S. *v.* Commonwealth Ins. Co., 193 U. S. 651	4
Winkfield [1902] Prob. 42	3
Treaty of Versailles, Sec. 9, Annex I to Art. 232	5

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REPLY BRIEF.

To Respondents' First Point.

The respondents have adopted the assumption of the Circuit Court of Appeals that the shipowners might have recovered the full market value of the vessel's use during detention, but they disclaim that there was any duty on the part of the shipowners so to recover, and say that the shipowners' omission to do so is immaterial, because the respondents had at all times a direct right of action against the petitioner.

Neither *The Conqueror*, 166 U. S. 110, nor *The Potomac*, 105 U. S. 630, is authority for the proposition that the shipowners could have recovered more than their actual loss. *The North Star*, 151 Fed. 168, 175. Indeed, their actual loss, whether more or less than the market value, would seem to be the proper measure of damages in a suit against a tort feasor, and we do not agree with the respondents' assertion that the

shipowners could have recovered more than their actual loss. The principle applied by the House of Lords in *The Susquehanna*, 17 Asp. Mar. Cases, 81, is no different from the principle of our own decisions. In both *The Conqueror* and *The Potomac*, *supra*, this Court was endeavoring to ascertain the quantum of the owner's pecuniary loss, which happened, in those cases, to coincide with the market value of the ship's use. The decisions illustrate the rule of "*restitutio in integrum*".

The question is, however, not important, because the respondents here premise their suit upon the existence of a direct cause of action in tort. The facts of this case clearly give no right of action in tort, for the reasons pointed out in our original brief.

It is said that the respondents' lost profits are not legally remote, because the shipowners might have suffered this additional loss if there had been no charterparty. The law does not use that test to determine whether a given loss is remote. The line is drawn quite without reference to whether the particular loss might have been suffered by one who could have recovered it. It could as well have been argued by the appellant in *Omaha Commercial Company* v. *United States*, 261 U. S. 502, that the losses suffered by the appellant in that case were merely a part of the losses that could have been sustained by the Steel Company, and might have been recoverable by the Steel Company from the government, in the absence of the appellant's contract.

While that case and the case of *Duckett* v. *United States*, 266 U. S. 149, involved the question of "taking" under eminent domain, the facts of those two cases illustrate the difference between a right that is purely contractual (like a charterparty such as the present one) and a right that amounts to a property in the *res*. Neither a "taking" of the *res* under eminent domain, nor an unintentional injury to the *res*, infringes the legal rights of one who has no property therein.

To Respondents' Second Point.

It is said that the decision below "involves no injustice to the petitioner". The same thing might be said, of course, in a case in which a court had chosen to disregard a statute of limitations, a well founded plea of *res adjudicata* (*Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316), or any other principal of our law (*Panama R. R. Co.* v. *Rock*, 266 U. S. 209). Is "justice according to law" to be redefined as "that decision which the sitting judge will arrive at as just according to the individual conscience of the Court?" Is the suggestion not tantamount to saying that in a case wherein a Court thinks a decision guided by long established principles of law will prove a hardship to a party then "justice" is to be done according to the conscience of the Court? This notion is as old as Protagoras who taught that the individual conscience is the measure of all things—a notion that Selden says obtained in the Equity of his day and which gave rise to his saying that it was the same as if equity were measured by the length of the Chancellor's foot (*Seldeni Opera*, Vol. 3, 2027; Edition of 1726).

In *Hines* v. *Sangstad S. S. Co.*, 266 Fed. 502, referred to by respondents, the recovery was the amount of hire the charterer was obliged to pay the owner during detention. The point involved here was not considered; but it may be noted in passing that the charterer in that case might possibly be said to have stood somewhat in the position of an insurer, and accordingly his right to recover might perhaps have been based on recognized principles of subrogation. If not, we know of no legal principle that would support the decision.

In *Dominion Coal Co.* v. *Maskinonge S. S. Co.*, [1922], 2 K. B. 132, the hire paid by the government for a requisitioned vessel was held to be apportionable between the owners and the charterers; but see the judgment of Scrutton, *L. J.*, in *Elliott Steam Tug Co.* v. *Shipping Controller* [1922], 1 K. B. at pp. 139, 140, and compare *Clavecrisk*, 264 Fed. 276, at 284-5. In *The Winkfield* [1902], P. 42, the plaintiff was a bailee.

To Respondents' Third Point.

The respondents' suggestion that the respondents were "solely entitled" to the use of the steamer leaves out of account that the owners of the ship were the immediate sufferers of the lost use. The owners lost the power to use their vessel in the performance of the contract they had engaged to perform by means of the vessel. What the charterers lost was their expected profit upon their contract with the subcharterers (R. 29-30).

The respondents argue that their contract with the shipowners was "property". That is admitted; but their contract gave them no property in the ship, and for an unintended injury of the ship, resulting in an impairment of the value of their contract, the law gives them no recovery.

Respondents state that a mortgagee of a vessel may sue for collision damages, citing *The Grand Republic*, 10 Fed. 398, where a mortgagee was allowed to intervene in a suit brought by the shipowner; but a mortgage is "both a lien in equity and a conveyance at law" (*U. S. v. Commonwealth Ins. Co.*, 193 U. S. 651, 656). The respondents' charterparty was neither; it created no proprietary interest in the vessel (*Osaka v. Lumber Co.*, 260 U. S. 490).

The cases cited by the respondents as instances in which equitable relief has or might have been given to a charterer have nothing to do with the charterers' right to recover damages for an unintended injury to the vessel. On familiar principles, one who *wilfully* interferes with another's contract is guilty of a tort (*Angle v. Chicago, etc., Ry. Co.*, 151 U. S. 1, 15); hence the act that would, if consummated, amount to a tort, may be enjoined (*Butterman v. Louisville, etc., R. R. Co.*, 207 U. S. 205); but that is far from saying that a *negligent* injury of a contract right gives rise to a cause of action. The law is otherwise.

To Respondents' Fourth Point.

The decision of the Umpire of the Mixed Claims Commission in the case of the *Vinland*, proceeded to some extent upon the authority of Judge Mayer's decision in *The Aquitania*, 270 Fed. 239, and the District Court's decision in the instant case. Moreover, irrespective of the Umpire's ground of decision, the Commission was authorized to award compensation for damage to "property" by aggression, and its decision in the *Vinland* case must be considered in connection with the language and purpose of the treaty under which the Commission was acting (Treaty of Versailles, Sec. 9, Annex I to Art. 232).

Johnson v. *Cadillac Motor Car Co.*, 261 Fed. 878, and the other cases cited by the respondents under this head are based on the "dangerous instrumentality" doctrine, referred to on page 7 of our original brief. The authorities are collated in 34 A. L. R. 63, 67, and 41 A. L. R. 9. The facts of this case leave it far outside that doctrine.

To Respondents' Fifth Point.

The respondents seem to rely upon some application of the New York doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, to the facts of this case. The principle announced in that case, and followed in New York and some other jurisdictions, has not met with anything like universal approval. Moreover, the doctrine is limited, even in New York, to cases *in which the promisor has agreed to render performance to the plaintiff, either named or described in the contract*. To illustrate: if A lends money to the defendant *upon the defendant's promise to pay it to the plaintiff*, to whom A is indebted, the plaintiff may sue upon the promise as made for his benefit. But no such right exists in any case unless the defendant has agreed that the plaintiff shall be regarded as the real promisee. The rule of *Lawrence* v. *Fox* is fully discussed in *Seaver* v. *Ran-*

som, 224 N. Y. 233. In the cases there cited, and in *Strong v. American Fence Construction Co.*, 245 N. Y. 48, to which the respondents refer, the defendant, in every instance in which recovery was allowed, had undertaken to perform the contract for the benefit of the plaintiff.

In the present case the respondents were not either mentioned or referred to in the contract between the petitioner and the shipowners, nor was their existence known to the petitioner when the contract was made.

Respectfully submitted,

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for the petitioner.